Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

DOROTHY NASH-HOLMES, *et al.*,

Cross-Petitioners,

v.

HERB HALLMAN CHEVROLET, *et al.*,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a prevailing defendant in a civil rights action can ever be awarded attorney's fees under § 1988 of the Civil Rights Act.

LIST OF PARTIES

Cross-Petitioners:

DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County

KARL HALL, III, individually and in his official capacity as Assistant District Attorney for Washoe County

FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney

JOHN J. LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney

MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney

WASHOE COUNTY, a political subdivision of the State of Nevada

Cross-Respondents:

HERB HALLMAN CHEVROLET, INC.,
a Nevada corporation

JOHN P. STANKO

JERRY VAN DER HOEVEN

JAMES BAYUS

STAN BONDICK

CRAIG CONRAD

TOM GEORGE

RON HALL

JOHN JULIAN

JUDY LIMON

DAN MAHONEY

EDWARD J. MATTS

RON SHERK

GREG STEWARD

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CITATIONS TO REPORTS AND ORDERS ENTERED

The Opinion by the Court of Appeals for the Ninth Circuit is reported at 169 F.3d 636 (9th Cir. 1999), and is set forth in Petitioners' original Appendix at App. 1. The district court entered two separate Orders in each case with respect to attorney's fees. The first set of Orders requested supplemental briefing on the attorney's fees issues and requested further detail of the fees requested. Those Orders are found in the Appendix at App. 1a and App. 4a. The second set of Orders were those granting the defendants their attorneys' fees. Those Orders are found in the Appendix at App. 7a and App. 17a.

CONCISE STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 3, 1999. Cross-Petitioners herein filed a petition for rehearing, which petition was denied on April 29, 1999.

Original Petitioners filed their Petition for Writ of Certiorari on July 2, 1999. This Conditional Cross-Petition is made pursuant to SCR 12.5 This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254, but only if this Court grants original Petitioners' Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C.S. § 1988 states, in relevant part:

> (b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C.S. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C.S. §§ 1681, *et seq.*], the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964 [42 U.S.C.S. §§ 2000d, *et seq.*], or section 40302 of the Violence Against Women Act of 1994[,], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

Plaintiffs (original Petitioners and Cross-Respondents herein) filed complaints in January of 1994 (Hallman) and February of 1995 (Salesmen), respectively. The primary bases for the complaints were allegations of civil rights violations arising out of an underlying criminal investigation and prosecution of Plaintiffs. The Defendants in those cases were various prosecutors employed by the Washoe County District Attorney's Office in Reno, Nevada, three

investigators employed by the District Attorney, and the County itself (collectively referred to as the "D.A. Defendants"). The D.A. Defendants moved for partial summary judgment on the majority of Plaintiffs' claims based on the doctrines of qualified and absolute immunity. On August 26, 1996, the district court granted partial summary judgment in favor of the D.A. Defendants. With respect to the investigation that took place before the Grand Jury proceedings, the district court found that the D.A. Defendants were protected by qualified immunity. With respect to the events that occurred after the prosecutors began presenting evidence to the Grand Jury in an attempt to seek indictments, the district court found that absolute immunity applied. However, several secondary claims survived the granting of partial summary judgment, including claims that the D.A. Defendants violated Plaintiffs' civil rights by withholding seized evidence, civil rights claims for "defamation plus," state law claims for defamation and malicious prosecution, and claims against the County for unlawful custom and policy.

After the August 26 Order, the D.A. Defendants began to conduct discovery[1] and continued to defend the actions. In doing so, the D.A. Defendants had to respond to two motions for reconsideration (one of which was voluntarily withdrawn by Plaintiffs after the County threatened to apply for sanctions [HD 125; SD 98]), take over twenty depositions, file a motion

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1. The D.A. Defendants conducted very little discovery before the August 26 Order because of their well-founded belief that they were subject to immunities and that having to conduct extensive and expensive discovery would defeat the very purpose of the immunities. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (noting that the important protections of the immunities are essentially lost if the defendants are forced to undergo discovery and trial).

for summary judgment on Plaintiffs' remaining claims, conduct an oral argument on the motion for summary judgment, file a "Daubert" motion with regard to Plaintiffs' expert witness, prepare the D.A. Defendants' experts for the "Daubert" hearing and for trial, and begin to prepare for a two to three week trial.

In October, in response to the D.A. Defendants' Motion for Summary Judgment on the remaining claims, Plaintiffs voluntarily dismissed the property retention claims and state law claims. SER 282-83. Then, at oral argument in December, Plaintiffs voluntarily dismissed all remaining claims against one of the D.A. Defendants, admitting that there was no basis for continuing to pursue him as a defendant. SER 286-90.

Therefore, the only claims that remained by the time of trial were the claims of defamation plus. With regard to the claims of defamation plus, Plaintiffs never identified any alleged statements made by Defendant Karl Hall that were alleged to be defamatory. However, they continued to pursue those claims even after they conceded that he never made any defamatory statements. SER 286-90. Plaintiffs never identified any alleged statements ever made by Defendant Michael Neville that were alleged to be defamatory. However, they continued to pursue those claims even after they conceded that he never made any defamatory statements. Further, Plaintiffs never identified any alleged statements ever made by Defendant John Long that were alleged to be defamatory. Their claims against Mr. Long were based solely on an allegation that he forwarded a copy of a public document (the indictment) to a third party. However they continued to pursue those claims even after they conceded that he never made any defamatory statements. Plaintiffs' sole allegation against Defendant Frank Landes was that he was

quoted in a newspaper as stating that "there was no unusual handling of the case." However, they continued to pursue those claims even after they conceded that he never made any defamatory statements. Finally, on January 8, 1997, only 13 days before the trial was scheduled to take place, Plaintiffs requested an emergency hearing to move for voluntary dismissal of all remaining claims against all remaining Defendants for the purported, if not pretextual, basis of expediting the appellate process. SER 291-95.

After the Plaintiffs ultimately voluntarily dismissed all of the remaining claims, the D.A. Defendants moved for their attorneys' fees in defending both actions from filing to final judgment. The district court denied without prejudice the D.A. Defendants' request for fees incurred prior to the immunities rulings, holding that "the analysis for frivolousness would be done better after the plaintiffs' appeal has been resolved." RE 424. However, the court subsequently granted the D.A. Defendants' request for attorneys' fees incurred after the immunities rulings, finding that the remaining claims asserted by plaintiffs were either frivolous at their inception or later became frivolous but were continued to be prosecuted by Plaintiffs. RE 427-32. *Hallman* Order Granting Fees, App. 7a; *Van der Hoeven* Order Granting Fees, App. 17a.

The district court, in granting attorneys' fees to the defendants, acknowledged the difficult legal standard that civil rights defendants have to meet to be entitled to an award of attorneys' fees under the civil rights statutes. *Hallman* Order Granting Fees, App. 9a; *Van der Hoeven* Order Granting Fees, App. 19a. The district court noted that "42 U.S.C. § 1988 authorizes attorney's fees to a prevailing defendant only if the plaintiff's claim was frivolous,

unreasonable, vexatious or groundless *ab initio*, or if the plaintiff continued to litigate after the claim clearly became so." *Id.* at 9a; 19a. The district court further noted that attorney's fees could only be granted to a prevailing defendant under very limited circumstances. However, as the court held: "This is such a case." *Id.*

In its analysis, the district court went through each of Plaintiffs' claims and discussed the facts and law with respect to each of those claims. The three most important claims that remained after the granting of summary judgment were Plaintiffs' claims of "retention of property" in violation of their civil rights, claims of "defamation plus," and claims against the County for unlawful policy and procedure. With regard to the property retention claims, the court found that:

> When defendant Washoe County moved (#114) for summary judgment on this claim, plaintiffs' response (#123) abandoned it. Their opposition (#152) to the attorney's fees motions does not explain this abandonment of the claim, or even mention it. From all of this the court finds the information and belief allegations of paragraph LI to be mere contrivance; this claim was frivolous when filed.

Id. at 13a; 23a.

The district court then turned to the "defamation plus" claims. In doing so, the court noted the requirements for a claim of defamation under state law as well as what it would take to turn a state law defamation claim into a federal civil rights claim of "defamation plus." *Id.* at 14a-15a; 24a-25a. The court noted that for a defamation plus claim, the

defamation must be tied to a recognizable § 1983 claim. *Id.* at 15a; 25a. Thus, as the district court noted, a mere injury to reputation or goodwill is insufficient to form a defamation plus claim unless those injuries are shown under state law to be legally protected interests. *Id.* The court held that: "Nothing in plaintiffs' papers (#123, 129, 152) makes this showing. For this reason, deciding whether plaintiffs' *State* defamation claim is frivolous would be an empty exercise; § 1983 is not implicated." *Id.*

With regard to the County, the district court addressed the issue of whether Plaintiffs' unlawful custom or policy claims were also unfounded and frivolous. The court reviewed Plaintiffs' arguments supporting their claim of unlawful custom or policy and found that "this claim is plainly frivolous." *Id.* at 13a; 23a. The district court then found that the D.A. Defendants and the County were entitled to their attorneys' fees incurred after entry of summary judgment against Plaintiffs and until Plaintiffs finally voluntarily dismissed their remaining claims.

Plaintiffs appealed that determination to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the findings of the district court and reversed the award of attorneys' fees. The Ninth Circuit did not address the property retention claims that served as a partial basis for the district court's award of attorney's fees or the unlawful custom and policy claims against the County. The appeals court did, however, review the "defamation plus" claims. There, the court held that it was unreasonable for the district court to find that the defamation plus claim was meritless or frivolous.

ARGUMENT

I.

THE NINTH CIRCUIT FAILED TO ADDRESS CERTAIN GROUNDS UPON WHICH THE DISTRICT COURT AWARDED ATTORNEYS' FEES.

The primary bases for Plaintiffs' complaints were allegations of civil rights violations arising out of the underlying criminal investigation and prosecution of Plaintiffs. On August 26, 1996, after significant discovery by Plaintiffs had taken place, the district court ruled that the D.A. Defendants were entitled to qualified immunity for the investigation and absolute immunity for the grand jury proceedings. RE 396. However, several secondary claims survived that order, including a claim that the D.A. Defendants violated Plaintiffs' civil rights by withholding seized evidence, a civil rights claim for "defamation plus," state law claims for defamation and malicious prosecution, and a civil rights claim against the County for unlawful custom or policy.

After the August 26 Order, the D.A. Defendants were forced to expend a great deal of time and effort defending against the remaining claims. That effort included taking depositions of all Plaintiffs, engaging in further motion practice, and preparing for trial. However, based on various voluntary dismissals at various different stages, Plaintiffs' claims began to collapse one by one. Finally, only 13 days before the trial was scheduled to take place, and while Motions for Summary Judgment on all remaining claims were pending decision from the district court, Plaintiffs requested an emergency hearing to move for dismissal of all

remaining claims against all remaining Defendants. The D.A. Defendants agreed to the voluntary dismissal with the express reservation that they would be entitled to move for their attorney's fees incurred in defending Plaintiffs' frivolous claims.

The D.A. Defendants then moved for their attorneys' fees in defending both actions from filing to final judgment. The district court, in awarding attorneys' fees to the D.A. Defendants, focused primarily on three specific claims: (1) "property retention" claims; (2) "defamation plus" claims; and (3) "unlawful custom or policy" claims with respect to the County. The court addressed each of those claims separately and in detail in determining that the D.A. Defendants were entitled to their attorneys' fees. The district court found that the property retention claims were a "mere contrivance," and thus were "frivolous when filed." *Hallman* Order Granting Fees, App. 13a; *Van der Hoeven* Order Granting Fees, App. 23a. With respect to the defamation plus claims, the district court properly found that no federal civil right was implicated in those claims. Therefore, the district court found that Plaintiffs never made out a claim for defamation plus. *Hallman* Order Granting Fees, App. 15a. Finally, the Court held that the unlawful custom and policy claims against the City were "plainly frivolous." *Id.*

Despite the district court's grant of attorneys' fees based on each of those frivolous claims, the Ninth Circuit Court of Appeals entirely overlooked the issues of the frivolous property retention claims and the unlawful custom and policy claims. In its decision, the Ninth Circuit addressed only the issue of the "defamation plus claims." Pet. App. 17-20. The Ninth Circuit specifically ruled that "we hold that it was

error to find the defamation plus claim unreasonable or frivolous." *Id.* at 20. However, the Ninth Circuit did not address in any fashion the issue of Plaintiffs' equally frivolous and meritless purported federal civil rights claims for retention of property or the "plainly frivolous" claims of unlawful custom or policy. Therefore, the Ninth Circuit committed a significant error in reviewing the decision of the district court. That error should be corrected by this Court.

II.

THE NINTH CIRCUIT MISAPPREHENDED NEVADA LAW WITH REGARD TO THE ISSUE OF WHETHER BUSINESS GOODWILL IS A PROTECTED PROPERTY RIGHT IN NEVADA.

In ruling on the defamation plus claims, the district court properly concluded that reputation and goodwill are not legally protected interests under Nevada law. In fact, Nevada law does not protect reputation or goodwill as legally protected interests. However, in the section of its decision dealing with the second claim of defamation-plus, the Ninth Circuit found that the district court overlooked the relevant portion of Plaintiffs' pleadings where Plaintiffs cited specific cases for the principle that business goodwill is a protected property right in Nevada. Petitioners' App. 20. In reaching this conclusion, the appeals court misunderstood and misapplied Nevada law. In its decision, the Ninth Circuit noted the Plaintiffs' citation to various cases for the proposition that Nevada law recognizes goodwill or reputation as a generally protected property interest. *See* Petitioners' App. 20, n.4 (citing *Ford v. Ford*, 782 P.2d 1304 (Nev. 1989) and *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 396 P.2d 683 (Nev. 1964)). However, neither *Ford* nor *Zale-*

Las Vegas, Inc. stand for the proposition for which Plaintiffs cited them, a detail which was pointed out to Plaintiffs' counsel by the United States Magistrate Judge during oral argument on the Motions for Summary Judgment. WCSER 202-05. While the *Ford* case recognizes that a professional practice's goodwill is part of the community property which is subject to division at divorce, the Nevada Supreme Court has never expanded its holding to recognize goodwill as a property interest in any situation other than divorce. *See Williams v. Waldman*, 836 P.2d 614 (Nev. 1992); *Malmquist v. Malmquist*, 792 P.2d 372 (Nev. 1990). Thus, the Ninth Circuit's decision with respect to the "plus" that makes up a claim of defamation plus is contrary to the law of the highest court of the state of Nevada. This Court should grant Certiorari in this case to correct the error made by the Ninth Circuit Court of Appeals in improperly applying law of the Nevada Supreme Court with respect to a state law issue.

III.

ALTHOUGH THE NINTH CIRCUIT PROPERLY CITED AN "ABUSE OF DISCRETION" STANDARD OF REVIEW, IT ESSENTIALLY REVIEWED THE DISTRICT COURT'S FINDINGS *DE NOVO*.

So long as the district court uses the proper legal standard for addressing attorneys' fees, awards of attorneys' fees are reviewed under an abuse of discretion standard. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Although the Ninth Circuit cited that standard of review, (Petitioners' App. 10), the D.A. Defendants submit that the Ninth Circuit did not provide the deference to the district court's findings required under that standard. The district court was fully aware of the history and procedure of Plaintiffs' claims at the time that it

awarded attorneys' fees. However, the Ninth Circuit did not give any deference to the findings of the district court on this issue and essentially reviewed the district court's findings *de novo*. For instance, the Panel found that the district court "apparently overlooked" portions of Hallman's papers with regard to the issue of protected property rights. However, that issue was discussed at length in the oral arguments on summary judgment before the magistrate on December 16, 1997. SER 286-90 (excerpt of transcript of hearing).

While the Ninth Circuit Court of Appeals cited to the appropriate legal standard for a review of an attorneys' fees award, it did not actually apply that standard. The district court used the proper legal standard in awarding attorneys' fees and was most familiar with the facts and procedures that led to an award of attorneys' fees to the Defendants. Thus, the district court did not abuse its discretion in awarding those attorneys' fees and the Ninth Circuit Court's reversal of that award was contrary to the law of this Court with respect to the proper deference to be given to the district court's findings and the proper application of the "abuse of discretion" standard of review.

Trial courts are on the front line of cases such as these. They live with the cases for months, if not years. The trial courts know not only what is shown on the docket sheet, but also the nuances and dynamics of the litigation. When a trial court makes a determination using the proper legal standard, and correctly applies the law to the facts of which the trial court is most keenly aware, that determination must, under the law, be given deference. This Court should grant Certiorari to clarify the proper deference that an appeals court should apply to a trial court's conclusions of fact when that trial court considers and properly applies the correct law to those facts.

CONCLUSION

The district court in this matter properly awarded Defendants and Cross-Petitioners herein their attorneys' fees in defending frivolous claims filed by Plaintiffs. The Defendants and the district court realized the heightened standard under the law in awarding attorney's fees to prevailing civil rights Defendants. However, this was a case where, even recognizing the heightened standard, the district court found that Defendants were entitled to some of their attorney's fees. The Ninth Circuit essentially ignored the findings of the district court in reversing that judgment. Based on the review given by the Ninth Circuit, the attorney's fees provisions of § 1988 become completely eviscerated with respect to prevailing Defendants. This Court should grant Certiorari to clarify that the law with regard to § 1988 has bearing and should be followed by the Courts.

Respectfully submitted,

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